IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 04-4 ERIE

ANTONIO M. TIRADO

RESENTENCING

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Courtroom C, U.S. Courthouse, Erie,

Pennsylvania, on Tuesday, September 13, 2005.

APPEARANCES:

MARSHALL J. PICCININI, Assistant United States Attorney, appearing on behalf of the Government.

THOMAS W. PATTON, Assistant Federal Public

Defender, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the Resentencing proceedings began at 10:00 a.m., on Tuesday, September 13, 2005, in Courtroom C.)

THE COURT: This is the time that has been set for resentencing in the case of Antonio M. Tirado. This is another resentencing in the wake of Booker.

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We do have a position with respect to sentencing factors that was filed by the defendant. And I think pertinently the most significant objection that is raised is that the applicable guideline was inaccurately computed in connection with the initial sentence. In that the base offense

level of 24 was inappropriate as a result of the improper inclusion by way of calculation of a previous conviction for possession within intent to deliver marijuana, a state felony. Do you want to address this, Mr. Patton?

MR. PATTON: Yes, your Honor. It is our position, as I think we set out in some detail in the papers, that Mr. Tirado received such -- his attorney completely failed to subject the Commonwealth's case to any kind of meaningful testing by the fact that the factual basis given for Mr. Tirado's plea of guilty to the possession with intent to distribute was only sufficient to support a conviction for possessing with intent to distribute a small amount of

marijuana.

THE COURT: May I ask you a couple questions here to maybe just focus our discussion. Under Custis, you would concede, I presume, that Custis swung closed the collateral attack door if you're complaining about a Strickland

deficiency?

MR. PATTON: Correct.

THE COURT: But as I read your papers, you're indicating what happened to your client at the change of plea to a constructive denial of counsel, is that right?

MR. PATTON: That's correct. In a constructive denial, basically, under the Cronic framework.

THE COURT: The Cronic three-prong framework. But only one is really applicable, the lack of meaningful adversarial testing, is that right?

MR. PATTON: That is correct.

THE COURT: Okay. Now, let's talk about that since we're on the same wavelength there. One reads the colloquy that occurred in state court and, in essence, the judge after -- well, it speaks for itself, I'm not going to try to read it. But it was clear, was it not, that he understood he was pleading to a felony conviction; I think the term felony is used?

MR. PATTON: Yes.

THE COURT: All right. What is it, and that's all I

know about the record, is the colloquy, I have nothing before me beyond the colloquy. What is it about the colloquy, actually I might, if I do, you can correct me. But what is it about the colloquy from which I can conclude that the conduct of the defense counsel was so egregious, if you will, as to move it outside of Strickland and into that very narrow category of constructive denial?

MR. PATTON: Well, your Honor, first off, on the issue of what you have from the record before you. You do have the lab report from the Pennsylvania State Police crime lab.

THE COURT: 2.8 grams?

MR. PATTON: Correct. Which establishes that the amount of marijuana at issue was less than 30 grams, which under Pennsylvania law is presumptively a small amount of marijuana.

THE COURT: Was it 2.8, is that right?

MR. PATTON: That's correct.

THE COURT: How does that state statute work, if you have less than 30 grams of marijuana, then you can -- there's a

creature possession with intent to deliver but not to sell?

MR. PATTON: Correct.

THE COURT: Is that what that is?

MR. PATTON: Correct.

THE COURT: But does that mean if you have less than 30 grams, you can't be charged with possession with intent to

distribute with intent to sell?

MR. PATTON: No.

THE COURT: It's not mutually exclusive, is it?

MR. PATTON: It is not. If there is less than 30 grams of marijuana at issue, is it not sufficient for the Commonwealth to simply prove that he possessed it with intent to distribute, the Commonwealth would have to prove that he possessed with the intent to distribute it for sale.

THE COURT: But if you have more than 30 grams then, is it presumptive that you intended to sell it?

MR. PATTON: If there's more than 30 grams, then the statute for a small amount doesn't apply.

THE COURT: All right. So, anyways, getting back to

my original question, what can I glean from the transcript and what I know that moves this out from under Strickland?

MR. PATTON: You have a factual basis given for a felony plea that does not set forth the elements necessary to establish the felony offense, but actually establishes only a violation of the small amount of marijuana statute which carries a maximum of 30 days imprisonment. And the defense attorney failed to recognize that and advise his client accordingly and say look, if that's the evidence the Commonwealth has, they can't prove you guilty of possession with intent to distribute, they can only prove you guilty of possessing a small amount of marijuana for distribution but not

for sale, don't plead to the offense.

THE COURT: The way they do their colloquies are a little different in state court than they are here. In essence, the court there says -- "Mr. Tirado, this is the Criminal Information that's been filed in your case. It's alleged that on or about December 24th of 1998 at count two," which is I presume the felony count?

MR. PATTON: It is.

THE COURT: "You committed the offense of possession with intent to deliver as a felony when you did unlawfully, feloniously and knowingly, with the intent to deliver, possess marijuana, that being a Schedule I substance." And then the rest of it not being particularly pertinent. So I'm clear on this, is it your position that what is materially deficient in that description is the judge should have included, for the purpose of sale?

MR. PATTON: Yes, he did not make sure that there was a factual basis to support the charge of a felony violation of possessing marijuana with intent to sell.

THE COURT: But if you say a felony -- when you say a felony, it would have to be synonymous with more than simply possessing with intent to distribute, wouldn't it?

MR. PATTON: For it to be a felony conviction, that is true. But this is, in establishing a factual basis, you have to not just state what the charge is, you have to make

sure that there are actual facts that support the elements of

that offense. And that wasn't done. Simply saying it's a felony, doesn't provide any facts.

THE COURT: In other words, it's just saying a felony, are you saying it wasn't sufficient to make it a knowing and intelligent waiver?

MR. PATTON: I'm saying that the Commonwealth failed to present a factual basis for the plea. Now, in this case it was the judge taking the plea that did the factual basis. But it is the Commonwealth's burden to establish that there are facts sufficient to support the plea. And it's decided in Pennsylvania case law --

THE COURT: I'm sorry to interrupt you, but are you saying if you have less than 30 grams, an element of the offense, and it would appear in the information, would be for the purpose of sale?

MR. PATTON: Yes, it has to be. Because that's the only thing that distinguishes. If you have less than 30 grams of marijuana, possessing that marijuana with intent to distribute does not in and of itself violate the felony statute of possession with intent to distribute a controlled substance. Because the subsection of the Controlled Substance Act -- it's

the Controlled Substance, Drug, Device and Cosmetic Act, I believe it's (a)(31), says notwithstanding other subsections of this section, if you have a small amount of marijuana and

possess it with intent to distribute, but not for sale, it's 30 days maximum. So it carves out, it uses on that language of notwithstanding any other section. So yes, if you have less than 30 grams of marijuana, simply saying you possessed with intent to distribute does not establish the felony offense of possession with intent to distribute. Because you have to have the addition that it was distribution for sale. A criminal defense attorney who is going to practice criminal law in the Commonwealth of Pennsylvania has to understand that distinction and understand that it's the Commonwealth, if all they have to show or all the evidence establishes is that your client possessed less than 30 grams of marijuana with intent to distribute, that doesn't cut the felony offense.

THE COURT: But how do I know that -- let me cut right to the chase, it's more of a procedural question than a substantive question. Can I determine whether there has been a

constructive denial without an evidentiary hearing?

MR. PATTON: I think you can under these circumstances. Because in this case it doesn't matter what evidence the Commonwealth may have had beyond what was put in the factual basis. Because when you're looking to whether or not there is a viable plea, when you have to make that determination, you're limited to looking at what was the factual basis put forth in the plea. The Commonwealth can't come in after the plea and say, well, we have this other

evidence that could establish that the intent to deliver was for sale.

THE COURT: But all you're really complaining about is, I don't mean to say all, but if the judge had not said with intent to deliver as a felony and had simply said intent to deliver, that would be one thing. But you're really complaining about the absence of a couple of words for sale?

MR. PATTON: Your Honor, those couple of words are the factual evidence that the Commonwealth has to present to establish that there is a factual basis for the defendant's

plea. Because the plea cannot be accepted unless it is made clear on the record that the Commonwealth has the evidence necessary to establish the offense, regardless if the defendant pleads guilty or not.

THE COURT: Do I know anything about whether any other charges were bargained away and dismissed, do I know anything about that -- wasn't there an escape charge?

MR. PATTON: There was an escape charge that was dismissed. There was a misdemeanor of possession of marijuana charge that was dismissed.

THE COURT: Is that in the record here, I thought I read it somewhere?

MR. PATTON: It's in the presentence report, it lists out the offenses that Mr. Tirado was initially charged with and then pled to.

THE COURT: Isn't this the case -- not a case where the bump on the log case, the lawyer is a bump on the log who does nothing, something happened here, he got some charges dismissed. He pled to the bigger charge to be sure. But he

said in his colloquy that he was guilty of the felony offense. Sometimes you take what you can get. There was some bargaining going on here, wasn't there?

MR. PATTON: There was some.

THE COURT: This wasn't the quintessential case where like somebody falls asleep at counsel table or something, something was happening?

MR. PATTON: Something was happening. But dismissing a misdemeanor possession of marijuana count is meaningless because that count would have, as a matter of law, merged with the possession with intent to deliver. So getting that count dismissed isn't doing anything beyond saying I'm pleading to the felony count. The escape charge was dismissed. And there was a resisting arrest, which was count three, which was a misdemeanor, too, that was reduced to a disorderly conduct, which is a misdemeanor.

THE COURT: All right, I have your point on this.

MR. PATTON: Even if your Honor, after Mr. Piccinini speaks, before you impose sentence, I want to talk about, even if you find that under the guidelines it has to be counted, I want to talk about your discretion.

THE COURT: I'll give you an opportunity. After he speaks, if you have some other comments you want to make on this issue, I'd be happy to hear them.

THE COURT: All right, Mr. Piccinini.

MR. PICCININI: Thank you, your Honor.

THE COURT: Now, couple of observations or questions. In your papers you try to characterize his, largely his objections as one of ineffective assistance. I don't think that's really -- I think he recognizes that would be precluded under Custis, you can't collaterally attack that. So we're on the same playing field, I think we are, he's really claiming that the performance here was so deficient that it's a constructive denial within that one prong?

MR. PICCININI: I think Cronic -- that may be what he claims. But as you look at the defense's papers and as you listen to the answers to the questions, they don't even get past a standard of ineffectiveness under Strickland, to even get to the point of Cronic, a complete failure to even have

counsel. And Cronic talks somewhat about this, your Honor.

They talk about the type of ineffectiveness that they're referring to. And in Cronic they say, this is at page 656 of the opinion, "when a true adversarial criminal trial has been conducted, even if defense counsel may have made demonstrable errors in the kind of testing envisioned by the Sixth Amendment has occurred." So even if Attorney Pitonyak, who is not a

lackluster attorney, defense counsel, who works hard for his clients, even if he would have made some demonstrable error, that is not the type of ineffectiveness that Cronic says can be deemed akin to a lack of counsel at all.

So the reason why my papers indicate that he is precluded from raising the issue is because it's not even close to that type of situation. For some of the reasons you already indicated. One, the defendant was charged with the possession of marijuana. He was charged with possession with intent to distribute marijuana, a felony. He was charged with an escape

charge. He was charged with, I believe with disorderly conduct. The possession of marijuana was dismissed. Counsel would have the court believe that even after having dismissed the possession of the marijuana, that he really should have been convicted of possession with a small amount. But that makes no sense. He was already charged with possession. In the negotiations for the plea, based upon the sufficiency of the evidence against Mr. Tirado, possession was dismissed. He was required by the government's proof and by the government's plea agreement to plead to possession with intent to distribute, which was a felony. And in light of that, and the escape charge was dismissed. You see that not only in the presentence report, but it's also in the colloquy itself at the time of the change of plea.

The difficulty, judge, just like they say in Custis,

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how difficult would it be for a sentencing court, a federal court, six and a half years later to now be in a position to have to re-litigate a conviction under a claim of ineffectiveness on less than half facts.

The truth of the matter is there is no record here that establishes Attorney Pitonyak's discussions with Mr. Tirado. There is no indication whatsoever as to the correct facts in the case. If Mr. Tirado claims to distribute the marijuana, as opposed to sell it, why wasn't that stated somewhere in here. Maybe it wasn't stated because the truth of the matter is that he intended to sell it. And Attorney Pitonyak, in reviewing the discovery materials, realized his client was dead to right on the charge of possession with intent to sell. It didn't matter that it was 2.7 grams. The truth of the matter is that they had enough evidence to support the charges that he was convicted of.

You know, even in the Cronic case and in Custis, we talk about the presumption that this court should look at, even when there's a claim of ineffectiveness. And it's the presumption that counsel is effective, that counsel needs to work hard on behalf of his client. There's nothing in this record to support even a claim of ineffectiveness, which can't be brought before you, and certainly not a claim of lack of counsel all together.

THE COURT: Let me ask you this. Did the judge who

took the plea misstate the elements of the offense?

MR. PICCININI: I don't believe that he misstated the elements of the offense. Because the possession with intent to distribute is the crime of possession with intent to distribute in the state system. Counsel's claim is that the possession of a small amount, if it's less than 30 grams, you intend to distribute but not to sell, then you should fall into that statute. But the concept of distribution includes both the sale and the mere handing over of the drugs. If there was an affirmative defense that yeah, I distributed but I didn't sell it, then that could have been raised. Counsel wants you to presume that it wasn't raised because the former counsel was ineffective. The record that you have before you would say that it wasn't raised because it wasn't a fact that the government had to prove sufficient to the charge.

On your point about the colloquy, judge. When colloquies at the time of a plea are insufficient, it is not defense counsel's ineffectiveness that is challenged for that. It is the government and the court's representation of the

facts to support a plea. So even if the factual colloquy was incorrect, how could Attorney Pitonyak, how can the defense counsel be faulted in this hearing as being ineffective. If the colloquy was insufficient, then after the plea occurs and after the conviction occurs, you go up to the Superior Court and you challenge the sufficiency of the colloquy. As the

court is familiar, insufficient colloquies provide the basis for the return of convictions on a regular basis. Here, it doesn't appear that the colloquy was insufficient. The defendant knowingly, didn't argue at all, agreed to plead in exchange for withdrawal of charges, to a felony charge of possession with intent to distribute. Not of the possession of a small amount of marijuana, which was an ungraded misdemeanor.

THE COURT: I asked him a question that raised the issue about an evidentiary hearing, I only raised it in this context. Under 2255, although this is not a 2255, but it's the functional equivalent if somebody is coming back and attacking, collaterally attacking on the basis of a denial of counsel, even if it's not styled that way. But under that statute

insofar as it relates to an evidentiary hearing, I just got reversed on this. It says you must -- and you're smiling because you probably know the case, it says the court must conduct an evidentiary hearing unless the facts conclusively show that the defendant is entitled to no relief. You're familiar with what I'm talking about?

MR. PICCININI: Sure, I'll be in court with you on Friday on that case. Your point about the need to have an evidentiary hearing to flush this out, is exactly why we shouldn't be having this conversation. That this court in the context of an ineffective assistance of counsel claim because this is nothing more than that, should not, as the Supreme

Court and as the Third Circuit said, should not be entertaining today, six and a half years later, a collateral attack upon that --

THE COURT: So what you're really saying is based upon what I have here, there's at worst, but you don't even think it is, it's ineffective assistance. But there's no evidence of a denial of counsel within the meaning of Cronic?

MR. PICCININI: It can't even be. You could claim that counsel was ineffective for not properly negotiating a better plea on behalf of the defendant. But there was a plea agreement. There was a discussion, there were charges dismissed and there was a defendant who knowingly pled. And if the court -- we would be entertaining these collateral challenges to every prior conviction that gave rise to an increased sentence, an increased sentencing guideline, and Custis makes clear that that is exactly what we should not be doing.

THE COURT: All right, I have your point, thank you. Mr. Patton, do you want to come up and either address that or move on to your second point?

MR. PATTON: The only response I have is that it is not an affirmative defense to a charge of possession with intent to distribute marijuana, that it was a small amount of marijuana involved, it's not an affirmative defense that the defendant has to raise. The statute itself at 35 Pa.C.S.

Section 780-113(a)(31), states "notwithstanding other subsections of this section, the possession of a small amount of marijuana only for personal use; the possession of a small amount of marijuana with intent to distribute it but not sell it; or the distribution of a small amount of marijuana but not for sale. For purposes of this section, 30 grams of marijuana or less is considered a small amount of marijuana." The statute itself sets out the elements of the offense, it's not an affirmative defense that Mr. Tirado or his counsel would be required to raise at trial. It's something the government has to prove to establish their case.

THE COURT: All right.

MR. PATTON: Your Honor, even if you conclude that you cannot address, that you have to count the prior conviction for possession with intent to distribute in calculating the guideline range, the whole reason we are back here in front of you today is because of the Supreme Court's decision in Booker.

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That says the guidelines are not binding on you, to treat them as such violates Mr. Tirado's Sixth Amendment right to have a jury decide all the elements of his offense and any facts that increase his sentence. And so you have to exercise your own

discretion in deciding what is the appropriate sentence. As we point out in our papers, Mr. Tirado's base offense level was raised 10 levels in this case based on two convictions. One was the possession with intent to distribute, which is

indisputably 2.8 grams of marijuana.

THE COURT: How much is that, can you give me some sense; what does it look like?

MR. PATTON: I should have followed my investigator's advice and brought in a bottle of oregano and tried to measure out 2.8 grams. Your Honor, I'm not a regular user of marijuana so I can't tell you how much --

THE COURT: I didn't ask you with the expectation that would come from personal experience.

MR. PATTON: But it is a small, small amount. I mean, if you think about it, 2.8 grams, it probably weighs less than the pen that you have up on your bench. It's just an incredibly small amount. You couldn't possibly get more than -- probably a couple joints from that amount. To kind of put it in perspective, the way the State of Pennsylvania treats

it, under their Sentencing Guidelines, which I'm putting up on the document camera, they have for -- what we would basically refer to as offense levels, they have five. With one being the less serious, five being the most serious. I'll zoom in on level two. And you see under level two that -- within level two they're broken down into three more categories. One of the categories, it's the most serious of level two, its possession with intent to distribute 1 to 10 pounds of marijuana. And you will see that also in that level two is the simple assault, that is also the other conviction Mr. Tirado has that increases

his offense level under Section 2K2.1.

Now, under the Pennsylvania statute, it's Annex A to Title 204 of the judicial system general provisions -- 303 sentencing guidelines, at Section 303.11, they kind of set out and describes these offense levels. Levels one, two, three, four and five.

Then this is what they have to say about level two. "Level two provides sentence recommendations for generally nonviolent offenders and those with numerous less serious prior

convictions, such that the standard range requires a county sentence but permits both incarceration and non-confinement. The standard range is defined as having upper limit of less than 12 months. And a lower limit of restorative sanctions, with work release, probation and those things." This is not an offense that the Commonwealth of Pennsylvania treats as seriously, for example, as if you look in a level three, it has possession with intent to distribute cocaine, etc., where there's less than 2.5 grams. They treat up to 10 pounds of marijuana less seriously than they treat 2.5 grams of cocaine. Here we're talking about 2.8 grams of marijuana. I mean the Pennsylvania statute says that 30 grams or less is considered a small amount of marijuana. And here we're talking 2.8 grams. So it is a minute amount of marijuana that is involved.

And I believe that that is something you can and should take into consideration in exercising your Booker

discretion. And along with that you should also consider the simple assault conviction in trying to put that into context as

we described in our papers, with the way other states deal with the offense of simple assault.

As we set out in the papers, every other jurisdiction in the Third Circuit Court of Appeals treats assault, whether they call it assault or some of them call it battery. It is either a misdemeanor or a disorderly persons offense in New Jersey. That at most someone can get up to one year of imprisonment. In Delaware you can get up to one year imprisonment. In New Jersey the maximum is six months. In the Virgin Islands the maximum is 30 days.

Now, in surrounding states, in New York, an assault is a class A misdemeanor for not more than one year. In Ohio it's a misdemeanor of the first degree, it's not more than 180 days. I did some further checking this morning. Alabama, it's a Class A misdemeanor, it's not more than a year. Alaska, is a Class A misdemeanor, not more than a year. Arizona, Class One misdemeanor, six months maximum. California, again, a misdemeanor, six months. Connecticut, it's a Class A misdemeanor, not more than one year.

With all of those jurisdictions -- in all those jurisdictions since the maximum possible penalty would be one year, an assault conviction in those jurisdictions could not be

25 considered under the federal Sentencing Guidelines as a crime

1 of violence. Because to be a crime of violence, the offense
2 has to carry a maximum punishment of over a year. Pennsylvania
3 just has a very odd grading system between misdemeanors and
4 felonies. They do not follow the common law distinction that
5 misdemeanors are offenses that allow up to one year of
6 imprisonment, a felony or anything you get more than one year.
7 And when you confine yourself to operating within the criminal
8 justice system of the Commonwealth of Pennsylvania, it's no big
9 deal. Because it's recognized, even on their sentencing
10 guidelines, they understand that even though a simple assault
11 has a statutory maximum of two years, it's treated in the same
12 category as nonviolent offenses and generally non-serious
13 offenses. It's only when you try and take this unique way of
14 grading simple assault and try and plug it into a framework
15 that was designed to apply nationally, with an assumption that
16 we will impose basically the common law distinction between
17 misdemeanors and felonies, that this simple assault conviction
18 in Pennsylvania results in an anomaly. And I'm not saying it

wasn't anything that was done maliciously, it's simply any time you try and draw up rigid guidelines that have to be applied through 50 different jurisdictions, you can end up having an anomaly such as this.

And the whole point of the guidelines, their selling point and even their selling point after Booker, that you should treat the presumed ranges or the ranges in the

guidelines as presumptively reasonable, is that well it's the way we can make sure that similarly-situated defendants are treated the same. But when it comes to a defendant in Pennsylvania who has a simple assault conviction, they're not treated the same as people, as defendants in other parts in the country in federal court, they're treated very differently.

If Mr. Tirado had an assault conviction for the equivalent of a Pennsylvania simple assault conviction in any other place in the Third Circuit, his offense level would be 20 under 2K2.1. If you have this conviction out of Alabama or Arkansas or Arizona, California or Connecticut, his offense

level would have been a 20.

And so now with Booker you have the discretion to look at that and say okay, I understand I have to consider the guidelines, but I can look past the rigid application of the guidelines to say in this case are the guidelines achieving the results they are supposed to be achieving. If they are not, before where you had to depart trying to see if this fit within a proper departure under the guidelines, you can say I understand that the whole point of the guidelines is to try and get consistency in sentencings throughout the country. Due to this anomaly in Pennsylvania law on simple assault, that purpose is being frustrated. And I can exercise my discretion to remove that anomaly.

I can assume that Mr. Piccinini may argue that,

well, that is kind of the way it works, he may catch a break on something else under Pennsylvania law. Well, if that is in fact the case, in any particular case, the United States Attorney's Office is free to bring that to your attention on a case-by-case basis to say hey, judge, this particular defendant

is catching a break due to some anomaly in Pennsylvania law that is being carried over into the federal guidelines. And if that turns out to be the case in a particular case, then that's something that you can specifically address. But simply it is not an accurate response to say well, okay, he catches the bad end of the deal on this one, but he probably is catching a break or other defendants that have convictions in Pennsylvania may be catching a break on some other issue. And so it basically all equals out in the end, you don't want to get into trying to pick at details in every case, otherwise, sentencings will get too complicated.

It's the whole point of Booker is to allow you to do this. If you can't use your discretion to tweak the guidelines when you are shown that the guidelines' purposes are being frustrated, then there isn't any point in having discretion. And we're simply back to a situation where our judges see what the guideline range is and applying it.

THE COURT: All right, thank you, Mr. Patton. We're going to take a brief recess.

(Recess from 10:30 a.m.; until 10:40 a.m.)

THE COURT: Mr. Piccinini.

MR. PICCININI: Your Honor, as I indicate in our response to the position with respect to sentencing factors. The government does not dispute in any way post Booker you have the discretion to impose any particular sentence. What I would disagree with is the defendant's guidance to the court that before you impose sentence that you tweak the guidelines in order to come up with a sentence. I think that the procedural posture here is actually would calculate a guideline that's calculated within the framework of the guidelines themselves. According to the rules of the guidelines as set forth. And then after having establishing the guideline range with its corresponding recommendation concerning that guideline range, you then decide what you're going to do and exercise your discretion.

With regard to his claims concerning the way in which the state system handles both the simple assault and the possession with intent to distribute marijuana. Counsel points at the guidelines and makes it appear that look, even the state

treats this so leniently, gets restorative sanctions or nothing. But I think what would be more important for the court to look at is the sentence that the court actually imposed against Mr. Tirado in the possession with intent to distribute to assess whether he took his offense seriously. And what you find out is he was sentenced to one to two years

imprisonment, not restorative sanctions, not probation. But the judge who sentenced Mr. Tirado on that charge is that they want the court to believe was pity and should not count for anything at his sentencing, he was actually sentenced to one to two years in a state correctional facility.

The same thing on the simple assault. The simple assault in other jurisdictions would be nothing. What did the man receive as a sentence for simple assault in the Court of Common Pleas. He received the statutory maximum penalty of 6 to 24 months. The maximum was two years, he got two years, judge. So that should give you a better indication of how this man was treated with regard to the seriousness of those two offenses. And I'll have additional comments once counsel is

done with the defendant's statements.

THE COURT: All right. This is an order.

ORDER

Presenting pending before the court are the Defendant's Position with Respect to Sentencing Factors. Pertinently, the defendant contends that his guideline calculation was in error in connection with his previous sentence. Essentially, the defendant argues that his prior drug conviction, that is possession with intent to deliver, a felony, which resulted in a base offense level of 24 under Section 2K2.1(a)(2), should not have been considered, because of the conduct of his attorney in connection with the change of

plea proceedings. More precisely, in my view, the defendant's claim is not that the attorney was ineffective, but that he should be entitled to collaterally attack his prior drug conviction because he was constructively denied the right to counsel at his change of plea. See United_States_v._Cronic, ——— ——— — ——— 466 U.S. 648. And there may be a constructive denial of counsel under the following circumstances. The first would be

where the accused is denied the presence of counsel at a critical stage. The second would involve a situation where counsel's conduct "entirely fails to subject the prosecution's case to meaningful adversarial testing." And the third would be where counsel is placed in circumstances in which even competent counsel would be unlikely to render assistance. That's Bell_v._Cone, 535 U.S. 685, 122 Supreme Court 1843, ____ — ____ (2002), at page 658.

In essence, the defendant here argues that the small amount of marijuana possessed by him, which the record would reflect was 2.8 grams, that in light of that his lawyer should not have permitted him to plead to the felony charge of possession with intent to deliver. The defendant argues that counsel's error in this regard was of such a magnitude that, in essence, he did not subject the prosecution to the crucible of adversarial testing.

I note that the circumstances under which a constructive denial of counsel may be found are extremely rare.

As stated in Childress_v._Johnson, 103 F.3d 1221, (5th Cir. 1997):

> "Accordingly, when the defendant can establish that counsel was not merely incompetent but inert, prejudice will be presumed.
>
> The vast majority of Sixth Amendment right to counsel claims can be analyzed satisfactorily under the two-pronged performance and prejudice test in Strickland. The federal courts of appeal, including this one, have repeatedly emphasized that constructive denial of counsel as described in Cronic affords only a narrow exception to the requirement that prejudice be proved.
>
> A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all ...
>
> In essence, we have consistently distinguished shoddy representation from no defense at all."

Here, based upon my review of the record, there is

no evidence of the type of egregious professional failure sufficient to support a constructive denial claim as that term has been described and as was set forth above. A review of the plea agreement reveals that the defendant knowingly pled guilty to the charge of possession with intent to distribute, which

was described as a felony charge. It appears from the record that two other charges were dropped in connection with the plea. There is a suggestion that the court who took the change of plea failed to include the words for sale. If in fact a deficiency it was, it was a deficiency on the court's part. There is also a suggestion here, although perhaps more implicit than explicit, that by virtue of the verbiage used in connection with the defendant's plea to the felony charge, that as a result of deficiency in the language, the plea was not knowing and voluntary. At most, in my view, this is an ineffective assistance or a Strickland claim masquerading in Custis clothing. I conclude, therefore, that a collateral attack at this time is inappropriate and I will deny it.

All right, I make the following findings. The offense level applicable in this case is 24. With a criminal history category of VI. Statutory provision as to custody not more than 10 years. The guidelines 100 to 120. Statutory provision as to probation not less than one year to not more than five years. The guideline provision ineligible. Statutory provision as to supervised release, not more than three. Guidelines two to three. Statutory provision as to a fine not more than $250,000. The guidelines $10,000 to $100,000. Restitution is inapplicable under both the statutory and the guideline provisions. And a special assessment of $100 applies with respect to both. Mr. Patton.

MR. PATTON: Your Honor, I've already argued to you as to how I believe you should exercise your discretion. I would say that I agree with Mr. Piccinini in the sense you had to make the guideline findings that you made --

THE COURT: I didn't take it that you were suggesting the guidelines, I have to start out with the guideline range and then go from there.

MR. PATTON: Correct. Mr. Tirado, obviously, has a fairly lengthy criminal history. I understand that. Mr. Piccinini talked about it at length at the first sentencing hearing, I expect he'll talk about it at length here.

But the thing I would stress to your Honor is that very criminal history has already twice been used by the guidelines to place Mr. Tirado in a range of 100 to 120 months. Number one, it has been used to calculate his criminal history category. Which is normal in the sentencing that we have here, there is always a criminal history calculation. But in this case not only are the priors being used to establish his criminal history category, the two priors that we've been discussing here this morning were also used to increase his offense level by 10 levels. Taking him from what would have been a 30 to 46, 47 month range, to 100 to 120 months. So to argue that he has a lengthy criminal history is, while relevant, is less meaningful in this case because that fact has already been used by the guidelines twice to massively increase

Mr. Tirado's sentence.

And I would just reiterate to your Honor that with the simple assault conviction, there is no way the government can argue that Mr. Tirado is not being treated very differently than if he had the same -- been convicted of the same conduct anywhere else in this federal circuit. And you can and I would submit should consider that and you should at a minimum exercise your discretion to give a sentence within a range of 70 to 87 months, which is where Mr. Tirado would be if he only had one prior conviction, either a crime of violence or a controlled substance offense.

THE COURT: All right.

MR. PATTON: I would ask that you recommend to the Bureau of Prisons that Mr. Tirado be housed at FCI McKean so he can be close to his family, who are here today in support of Mr. Tirado. That will allow him to have visits with his family.

I would suggest that he does not have any ability to pay a fine and would ask your Honor to waive a fine.

And Mr. Tirado would like to make a statement to your Honor.

THE COURT: Okay. I can check the record, I probably have it in here, but what did I give on probation the

last time?

MR. PATTON: Supervised release?

THE COURT: I meant supervised release?

MR. PATTON: Three years.

THE COURT: All right.

THE DEFENDANT: I would just like to say --

THE COURT: I can't hear you, speak into that so I can hear you.

THE DEFENDANT: The sentence you gave me --

THE COURT: I cannot hear a word you're saying to me.

THE DEFENDANT: I would like to serve the sentence that you gave me and move on.

THE COURT: All right, thank you. Mr. Piccinini.

MR. PICCININI: Thank you, your Honor. Your Honor, I recognized earlier, the government recognized earlier your ability to exercise your discretion. However, to the extent that you would exercise your discretion with regard to this particular defendant, the government would request that you

exercise your discretion in a different fashion. That this is a case, guidelines or not, that Mr. Tirado is a person who was convicted after a trial in this court last year. He deserves a sentence of the statutory maximum of 10 years. And I can count on probably one hand the number of times I have been before the court requesting that an individual before you receive the statutory maximum. And guidelines or not, that's the sentence that he deserves, judge. You have within your discretion a

10-year maximum that must be imposed against this defendant.

And I'd like to explain to the court why that is. Counsel says that all of the 17 convictions have already been factored into the guidelines. Technically that's correct.

But what's not factored into the guidelines is this defendant's track history since the age of 13 with those 17 convictions. I would like to on the record just go through that. Because I think it screams out to the court that this man needs to be taken off the street. Because if he's not taken off the street, other individuals and society in general will be victimized.

He started his criminal history at the age of 13 by striking his principal. Then after being place in Vision Quest to rehabilitate him, he absconded. He then moved on to slipping a lock on an apartment, and entered the apartment that was not his. He then attacked a victim. You know kids at 13 they throw snowballs, this defendant at age 13 not only threw snowballs, then he pulls over and gets out of the car, he and his buddies then attacked the victim and pummeled her with additional ones.

The defendant then gets into a stream of thefts at the age of 14. Thefts of a walkie-talkie. Thefts of necklaces.

Moves on to the age of 15, stealing cars. Stole two different cars. He fails to appear for hearings as a result of

the second stolen car. He ends up being sent to a forestry camp for an indefinite period, ends up staying there for a period of four years. Moves on to additional thefts and steals a necklace.

Then has a series of disorderly conducts. I think

are important, typically I wouldn't care, I would say disorderly conduct, no big deal. But when Mr. Tirado committed these disorderly conducts, they were almost all in the context of police officers, that he acted out violently against them when they attempted to make an arrest.

At the age of 18 disorderly conduct, he fled from the police. When he was apprehended, he lied and gave two different identities. He's then convicted of indirect criminal contempt. He then attacks another victim and cold-cocks the victim, punches him in the face while he's standing pumping gas in a gas station. He's then sentenced to a sentence of intermediate punishment. And a little bit of leniency the court previously provided to him and he messes up on that, the intermediate punishment has to be revoked. He is then sentenced to the statutory maximum of 6 to 24 months.

At the age of 19 another disorderly conduct. A traffic stop was being attempted against the defendant. He was driving without a driver's license. As the police officer not only attempted to stop him, but yelling into the passenger window to get him to stop, he turns and he yells "F-you, give

me a ticket," and continues to drive on. The man is completely incorrigible and has no respect for the law and never has.

Then again at the age of 19, disorderly conduct, attempting to be placed under arrest, he pulls away and then runs from the police officers.

Again, at the age of 19, he stopped and he receives the conviction for the possession of intent to distribute, excuse me, the possession of marijuana.

Then at the age of 20 criminal mischief, pled down to criminal mischief after stealing an individual's cell phone.

Then at the age of 21 possession with intent to distribute marijuana. And was clearly not considered in the guidelines what happened. During his track history on that 17th conviction. He receives a sentence of one to two years. He's then paroled. Within a month he's returned back to the state prison. He's then released again. After being out again, his parole is revoked, he serves another sentence of one to two years. He's released again and placed on probation. And then he's revoked again as a result of this federal conviction.

We're not here today, judge, because of this defendant having possessed with the intent to distribute some marijuana. We discussed that a lot here. That's not what the sentence is about.

This man, after 17 criminal convictions, after all

of the attempts through the system that he's had, while on state parole, parole officers go to his house to conduct a search, they find a fully automatic, excuse me, a fully loaded weapon in his possession. He was a prohibited person and should be, judge, this is not a person in whose possession guns should be allowed.

Counsel asked the court that I can't dispute that Mr. Tirado is going to be treated differently here in the State of Pennsylvania. I indicate to the court that Mr. Tirado should be treated differently. Mr. Tirado has 17 convictions, are unlike a lot of people here, with some serious convictions. And a lot of these are not serious, but they paint a picture for this court of the defendant. If you let him out anything short of 10 years, law enforcement and the community will have

to deal with him. He has proven to this court since the age of 13 all the way to today, that this is a defendant who needs to remain incarcerated.

And at the last sentencing, after the court imposed sentence, this is a man who stood up in court, turned to myself and to law enforcement officers in the room, pointed at us and let us know that he'd be back. Well, he is back, he shouldn't be back again, judge, he should go to jail for 10 years. And in 10 years he should serve supervised release and hopefully spend those 10 years maturing and recognizing the need to comply with the law. That's all I have.

MR. PATTON: Your Honor, if I could. I apologize for doing this out of order. Mr. Tirado's brother would like to make a statement.

THE COURT: That's all right, I have no problem with that, let's do that right now. Mr. Tirado, come up to the microphone. Give me your full name, please?

MR. SAMUEL TIRADO: My name is Samuel Tirado.

THE COURT: Raise your right hand.

SAMUEL TIRADO, DEFENSE WITNESS, SWORN

MR. SAMUEL TIRADO: I'm here to speak on my brother's behalf. See my brother he's the only person I got in my life. All the stuff that he's saying, makes him look like a bad person and maniac. I was listening as he was going down the line. Like he's throwing snowballs at the playground. We'll just to make that comment, that was me, Samuel Tirado, that wasn't Antonio Tirado. Okay. And I got charged for that.

What I'm trying to say is for that 2.3 grams of weed, they took seven years out of my life, they took seven years out of his life for 2.3 grams of weed. Now, 10 more years, that's going to be 17 years total. My life is going down hill. Because I got nobody with me. He's the only person I got in my life. The only person. I was listening to all the lying, I'm pretty sure you seen me shake my head out there for all the stuff, he was making my brother look like a maniac. My brother has never hurt nobody. Never. He's never hurt anybody

in his life. Never. Taken 17 years out of his life that only destroyed his life, that's destroyed my life and his kids'

life, too.

Every month I got to come out, I got to do what I got to do, legal or illegal, do what I got to do to support my kids and his kids because he's not around. This is not only hurting him, this is hurting the whole family.

I would like for you to consider what's going on all through this courtroom right now. Thank you, that's all I have to say.

THE COURT: Thank you, Mr. Tirado. Do you have anything else, Mr. Patton.

MR. PATTON: No, your Honor.

THE COURT: I'm going to take a brief recess.

(Recess from 11:02 a.m.; until 11:07 a.m.)

THE COURT: In the wake of the decision by the U.S. Supreme Court in United_States_v._Booker, the sentencing guidelines, of course, are advisory only. However, I am obligated to consult those guidelines in determining the appropriate sentence.

In addition to the Sentencing Guidelines under Booker, I must also consider the other factors which are set forth in 3553(a), which requires me to impose a sentence

"sufficient but not greater than necessary" to comply with the purposes set forth in paragraph two. Section 3553(a)(2),

states in relevant parts that the purposes are:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence for criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Section 3553(a) further directs the sentencing court to consider, (1) the nature and circumstances of the offense and the history and characteristics of the defendant; the kinds of sentences available; the need to avoid unwanted sentencing disparities among the defendants with similar records who have been found guilty of similar conduct; and the need to provide

restitution to any victims of the offense.

In fashioning this sentence today, I have carefully considered the advisory guideline range, as well as all of the other factors which I have just articulated.

As was true at the original sentencing, it is significant in my view that this defendant stands before the court with 17 prior adult and juvenile convictions. The record does reflect and a careful review of the presentence report

demonstrates in my view a complete lack of remorse on the part of this defendant, as well as a pattern of contempt for authorities. Given this defendant's background, the protection of the public in a case like this becomes of paramount importance, as well as the factor of deterrence.

Would you please rise, Mr. Tirado. In light of all of those factors and after careful consideration, I see no reason to deviate in any form or fashion from my previous sentence.

Consequently, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant is

sentenced to precisely the same sentence that I imposed on August 5, 2004. All of those terms and conditions are incorporated herein as has been fully set forth.

Do you understand that you have the right to appeal this sentence I imposed today, but if you choose to do so, you must do so within 10 days; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right, we're adjourned.

MR. PATTON: Your Honor, we would ask that you recommend to the Bureau of Prisons that Mr. Tirado be housed at FCI McKean.

THE COURT: I'm sorry, where should I recommend?

MR. PATTON: FCI McKean.

THE COURT: Where is he now?

MR. PICCININI: He's still serving his state sentence. That was my only question, it was clear on the record that you are making today's sentence consecutive, as you did back in August of 2004?

THE COURT: I am.

MR. PICCININI: He's actually serving that sentence at SCI Greene currently.

THE COURT: I did make my previous sentence consecutive and this is consecutive as well. As I said, I am incorporating my previous sentence in its entirety as has been fully set forth.

Mr. Patton, with respect to your request, yes, it is my recommendation on the record to the BOP that this defendant be housed at FCI McKean subsequent to the completion of his state sentence. All right, we are now adjourned.

(Whereupon, at 11:11 a.m., the Resentencing proceedings were concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Ronald J. Bench

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